

Aug 23, 2016

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KRISTA LANGLEY,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03102-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, AND CAUTIONING
COUNSEL

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14¹, 26. Attorney D. James Tree represents Krista Langley (Plaintiff); Special

¹The Court notes the following inappropriate language employed by counsel in Plaintiff's Motion for Summary Judgment: "Rather than properly considering the medical record as a whole, as the ALJ was required to do, he instead cherry-picked portions of General Appearance examinations—many unrelated to [Plaintiff's] psychiatric treatment—and mental status examinations to support his predetermined conclusion that she is not disabled." ECF No. 14 at 14.

This is not the only instance of objectionable phraseology over this attorney's signature in recent cases before this Court. *See Douglas v. Colvin*, 1:15-cv-3119-JTR, ECF No. 13 at 7 ("[Plaintiff] applied for benefits in 2011 and SSA

1 Assistant United States Attorney Martha A. Boden represents the Commissioner of
2 Social Security (Defendant). The parties have consented to proceed before a
3 magistrate judge. ECF No. 5. After reviewing the administrative record and the
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5 again found he was limited to less than a full range of light work, but denied him
6 because he was still 54 years old. Tr. 119. [Plaintiff] was 55 years old on his
7 current application date for SSI, therefore, the only way the ALJ could deny [the]
8 claim was to find he could perform medium work and/or reclassify his past
9 relevant work.”); *Vargas v. Colvin*, 1:15-cv-03078-JTR, ECF No. 23 at 5 (“The
10 prior ALJ’s decision was overturned when the prior ALJ relied on reviewing only
11 physicians to find [Plaintiff] could perform light work, despite evidence that
12 [Plaintiff] was limited to sedentary work by his treating physician. Tr. 109, 124,
13 509. Now that [Plaintiff’s] age category had increased and he would be found
14 disabled if limited to light work this ALJ increased his RFC to medium work
15 despite no doctor offering an opinion above light work, and only reviewing doctors
16 finding he could perform as much as light work.”). Nor is this the first time this
17 Court has brought the matter to counsel’s attention. *See Vargas v. Colvin*, 1:15-cv-
18 03078-JTR, ECF No. 24 at 18 (“Finally, in Plaintiff’s Reply, ECF No. 23 at 6, line
19 15, there is language that, intentionally or carelessly, could appear to question the
20 motivation of the Administrative Law Judge who heard this matter. The Court
21 finds no basis for such language, and no place for it in these proceedings.”).

22 The quoted language and inflections are gratuitous to any legal or factual
23 argument, but imply misconduct on the part of Administrative Law Judges. Such
24 innuendo is improper and unprofessional. Recklessly impugning the integrity of
25 an adjudicatory officer goes beyond zealous advocacy and can be a violation of
26 professional ethics. *See* Washington State Bar Association R.P.C. 8.2(a). If
27 counsel is concerned about the conduct of an ALJ, the Social Security
28 Administration has procedures to raise the issue. *See* S.S.R. 13-1p.

1 briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for
2 Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and
3 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
4 42 U.S.C. § 405(g).

5 **JURISDICTION**

6 Plaintiff filed applications for Supplemental Security Income (SSI) and
7 Disability Insurance Benefits (DIB) on July 29, 2011 and August 25, 2011,
8 respectively, alleging disability since October 22, 2010, due to severe anxiety,
9 schizophrenia, fibromyalgia, and depression. Tr. 213-222, 229, 233. The
10 applications were denied initially and upon reconsideration. Tr. 124-130, 138-149.
11 Administrative Law Judge (ALJ) Verrell Dethloff held a hearing on September 12,
12 2013, and heard testimony from Plaintiff, medical expert Robert McDevitt, M.D.,
13 and vocational expert Trever Duncan. Tr. 16-57. The ALJ issued an unfavorable
14 decision on September 27, 2013. Tr. 103-119. The Appeals Council denied
15 review on April 13, 2015. Tr. 1-6. The ALJ's September 27, 2013, decision
16 became the final decision of the Commissioner, which is appealable to the district
17 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
18 on June 16, 2015. ECF No. 1.

19 **STATEMENT OF FACTS**

20 The facts of the case are set forth in the administrative hearing transcript, the
21 ALJ's decision, and the briefs of the parties. They are only briefly summarized
22 here.

23 Plaintiff was 18 years old at the alleged date of onset. Tr. 213. Plaintiff
24 completed the tenth grade in 2009 and attended some special education courses.
25 Tr. 234. Plaintiff reported that she attempted to work as a dishwasher and picking
26 apples, but found both jobs too stressful and each lasted less than a week. Tr. 402.
27 Plaintiff's earnings record shows very limited earnings from Strand Orchards LLC
28 in 2007. Tr. 225.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law *de novo*, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the claimant establishes that physical or mental impairments prevent her from engaging in her previous occupations. 20 C.F.R. §§

1 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,
2 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
3 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
4 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
5 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot
6 make an adjustment to other work in the national economy, a finding of “disabled”
7 is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

8 ADMINISTRATIVE DECISION

9 On September 27, 2013, the ALJ issued a decision finding Plaintiff was not
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity since October 22, 2010, the alleged date of onset. Tr. 105.

13 At step two, the ALJ determined Plaintiff had the following severe
14 impairments: a cognitive disorder with borderline intellectual functioning,
15 affective disorders variously diagnosed as depression and dysthymia with some
16 indications of psychotic features, anxiety disorders variously diagnosed as
17 agoraphobia and panic disorder, a personality disorder, and substance abuse. Tr.
18 105.

19 At step three, the ALJ found Plaintiff did not have an impairment or
20 combination of impairments that met or medically equaled the severity of one of
21 the listed impairments. Tr. 107.

22 At step four, the ALJ assessed Plaintiff’s residual function capacity and
23 determined she could perform a range of work at all exertional levels with the
24 following nonexertional limitations: “she is limited to simple, repetitive work
25 involving noncollaborative tasks, superficial interaction with coworkers, and no
26 interaction with the public.” Tr. 109. The ALJ concluded that Plaintiff had no past
27 relevant work. Tr. 117.

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1 At step five, the ALJ determined that, considering Plaintiff's age, education,
2 work experience and residual functional capacity, and based on the testimony of
3 the vocational expert, there were other jobs that exist in significant numbers in the
4 national economy Plaintiff could perform, including the jobs of production
5 assembler, hand packager, and small product assembler. Tr. 118. The ALJ
6 concluded Plaintiff was not under a disability within the meaning of the Social
7 Security Act at any time from the alleged date of onset, October 22, 2010, through
8 the date of the ALJ's decision, September 27, 2013. Tr. 119.

9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's
11 decision denying benefits and, if so, whether that decision is based on proper legal
12 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh
13 medical source opinions; (2) failing to find Plaintiff met a listing at step three, and
14 (3) failing to properly consider the credibility of Plaintiff and lay witnesses.

15 DISCUSSION

16 A. Medical Source Opinions

17 Plaintiff argues that the ALJ failed to properly consider and weigh the
18 medical opinions expressed by Aaron Burdge, Ph.D., Janis Lewis, Ph.D., Roland
19 Dougherty, Ph.D., and Robert McDevit, M.D. ECF No. 14 at 12-22.

20 In weighing medical source opinions, the ALJ should distinguish between
21 three different types of physicians: (1) treating physicians, who actually treat the
22 claimant; (2) examining physicians, who examine but do not treat the claimant;
23 and, (3) nonexamining physicians who neither treat nor examine the claimant.
24 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
25 weight to the opinion of a treating physician than to the opinion of an examining
26 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
27 more weight to the opinion of an examining physician than to the opinion of a
28 nonexamining physician. *Id.*

1 When a treating physician's opinion is not contradicted by another
 2 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
 3 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
 4 physician's opinion is contradicted by another physician, the ALJ is only required
 5 to provide "specific and legitimate reasons" for rejecting the opinion of the treating
 6 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
 7 an examining physician's opinion is not contradicted by another physician, the
 8 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
 9 F.2d at 830. When an examining physician's opinion is contradicted by another
 10 physician, the ALJ is only required to provide "specific and legitimate reasons" for
 11 rejecting the opinion of the examining physician. *Id.* at 830-831.

12 The specific and legitimate standard can be met by the ALJ setting out a
 13 detailed and thorough summary of the facts and conflicting clinical evidence,
 14 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
 15 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
 16 conclusions, he "must set forth his interpretations and explain why they, rather
 17 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
 18 1988).

19 **1. Aaron Burdge, Ph.D.**

20 On June 11, 2012, Dr. Burdge completed a Psychological/Psychiatric
 21 Evaluation for the Washington Department of Social and Health Services (DSHS).
 22 Tr. 464-480. Dr. Burdge diagnosed plaintiff with schizophrenia, anxiety disorder,
 23 and personality disorder. Tr. 464. Dr. Burdge opined that Plaintiff had multiple
 24 limitations in the moderate, marked, and severe ranges and stated that Plaintiff "is
 25 unlikely to function adequately in a work setting until her psychological symptoms
 26 have been managed more effectively." Tr. 466. The ALJ gave Dr. Burdge's
 27 opinion "little weight" because the opinion was inconsistent with Plaintiff's

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1 longitudinal treatment history, her performance on mental status examinations, and
2 her independent daily activities. Tr. 114-115.

3 As discussed above, to meet the specific and legitimate standard the ALJ is
4 required to do more than offer his conclusions, he “must set forth his
5 interpretations and explain why they, rather than the doctors’, are correct.”
6 *Embrey*, 849 F.2d at 421-422. Here, this did not occur. The ALJ simply stated
7 that he gave Dr. Burdge’s opinion “little weight” and provided three conclusory
8 reasons for the determination. Tr. 114-115. The ALJ failed to state how the
9 opinion was inconsistent with Plaintiff’s treatment history, how it was inconsistent
10 with her performance on mental status examinations, or how it was inconsistent
11 with her daily activities. Because the ALJ’s rationale failed to meet the lowest
12 standard to uphold a rejection of Dr. Burdge’s opinion, the ALJ erred.

13 Dr. Burdge was an examining psychologist who performed multiple tests on
14 Plaintiff prior to forming his opinion. *See* Tr. 466-480. The ALJ failed to supply
15 legally sufficient reasons to reject his opinion. Therefore, this case is remanded for
16 additional proceedings for the ALJ to reweigh Dr. Burdge’s opinion.

17 **2. Janis Lewis, Ph.D.**

18 On July 14, 2012, Dr. Lewis reviewed the evaluation performed by Dr.
19 Burdge and completed a Review of Medical Evidence form for DSHS finding
20 Plaintiff met the standards for assistance from DSHS starting June 11, 2012, for
21 two years, noting that some limitations may be drug related. Tr. 481. The ALJ
22 gave “little weight” to Dr. Lewis’ form for the same reasons he rejected Dr.
23 Burdge’s opinion. Tr. 114-115.

24 Dr. Lewis is a nonexamining psychologist whose opinion is derived from
25 Dr. Burdge’s earlier opinion. *See* Tr. 481 (the only records reviewed were those
26 from Dr. Burdge). Considering the case is being remanded for the ALJ to reweigh
27 Dr. Burdge’s opinion, the ALJ is further instructed to reweigh Dr. Lewis’ opinion
28 on remand.

1 **3. Ronald Dougherty, Ph.D.**

2 On September 28, 2011, Dr. Dougherty completed a Psychological
3 Evaluation for Social Security. Tr. 400-416. He diagnosed Plaintiff with a
4 cognitive disorder, dysthymia, agoraphobia, panic disorder, psychiatric disorder,
5 and a rule out diagnosis of paranoid schizophrenia. Tr. 405. Additionally, he
6 found that Plaintiff had a full scale IQ score in the borderline range and dependent
7 personality traits. *Id.* Dr. Dougherty opined that while Plaintiff's social skills
8 appeared to be fair, "[h]er thinking was basically logical and goal directed. She
9 has not been able to function on the job because of what she reports as severe
10 anxiety when away from home. She should be able to understand, remember, and
11 follow simple directions, as she did during the testing." Tr. 406.

12 The ALJ gave Dr. Dougherty's evaluation and opinion "little weight" for the
13 same reasons he gave Dr. Burdge's opinion little weight. Tr. 114-115. These three
14 reasons fail to meet the specific and legitimate standard and were in error. *See*
15 *supra*. Additionally, the ALJ found that Dr. Dougherty's opinion was inconsistent
16 with the testing he completed and it was "based in large part if not entirely on the
17 claimant's self-report of severe anxiety." Tr. 115.

18 While the ALJ is accurate that internal inconsistencies with the
19 psychologist's report is a legally sufficient reason to reject an opinion, *See Bayliss*
20 *v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005), the ALJ failed to state how Dr.
21 Dougherty's opinion was inconsistent with the test results from the day of the
22 evaluation. Tr. 115. Plaintiff took the Trail Making Test, the Wechsler Adult
23 Intelligence Scale-IV (WAIS-IV), and the Wechsler Memory Scale (IV (WMS-
24 IV). Tr. 403-404, 407-416. Results from the Trails Making Test suggested the
25 presence of a moderate cerebral impairment. Tr. 403. The WAIS-IV placed
26 Plaintiff's intelligence in the borderline range. Tr. 404. The WMS-IV showed
27 Plaintiff's auditory and visual memory in the low average range, her visual
28 working memory in the borderline range, her immediate memory in the average

1 range, and her delayed memory in the extremely low range. *Id.* The ALJ failed to
2 state how these test results were inconsistent with claimant being cooperative with
3 logical and goal-directed thinking and capable of understanding, remembering, and
4 following instructions. Therefore, this reason fails to meet even the specific and
5 legitimate standard.

6 Additionally, the ALJ found that Dr. Dougherty's opinion was based on
7 Plaintiff's unreliable self-reports that she suffered severe anxiety when away from
8 home. Tr. 115. A doctor's opinion may be discounted if it relies on a claimant's
9 unreliable self-report. *Bayliss*, 427 F.3d at 1217; *Tommasetti v. Astrue*, 533 F.3d
10 1035, 1041 (9th Cir. 2008). But the ALJ must provide the basis for his conclusion
11 that the opinion was based on a claimant's self-reports. *Ghanim v. Colvin*, 763
12 F.3d 1154, 1162 (9th Cir. 2014). While Dr. Dougherty's opinion does state that
13 Plaintiff "has not been able to function on the job because of what she reports as
14 severe anxiety when away from home," the ALJ did not indicate how the
15 remainder of Dr. Dougherty's opinion was swayed by Plaintiff's self-reports to
16 support his conclusion that the opinion was based "in large part if not entirely on
17 claimant's self-report." Tr. 115, 406. In *Ghanim*, the Ninth Circuit held that
18 "when an opinion is not more heavily based on a patient's self-reports than on
19 clinical observations, there is no evidentiary basis for rejecting the opinion." 763
20 F.3d at 1162. Here, substantial evidence does not support that Dr. Dougherty's
21 whole opinion was more heavily based on Plaintiff's self-reports than on Dr.
22 Dougherty's clinical observations and testing results. Therefore, this reason fails
23 to meet the specific and legitimate standard as well.

24 In conclusion, the ALJ failed to state a legally sufficient reason for rejecting
25 Dr. Dougherty's opinion. Therefore, on remand, the ALJ is to reweigh the
26 opinion.

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1 **4. Robert McDevitt, M.D.**

2 At the September 12, 2013 hearing, Dr. McDevitt testified that Plaintiff met
3 listings 12.03 and 12.04 with underlying substance abuse problems. Tr. 48-49. He
4 further stated that she could not currently perform simple, repetitive tasks, but
5 could with medication and a structured environment, concluding that she could
6 only work in a sheltered program. Tr. 48. The ALJ rejected Dr. McDevitt's
7 opinion for the same three reasons he rejected the opinions of Dr. Burdge, Dr.
8 Lewis and Dr. Dougherty. Tr. 114-115. Additionally, the ALJ noted that Dr.
9 McDevitt's opinion was confusing and equivocal. Tr. 115.

10 Here, Dr. McDevitt was a nonexamining psychiatrist who reviewed the
11 record made available at the time of the hearing. Based on his testimony, it is clear
12 that his opinion is derived, at least in part, from the opinions of Dr. Dougherty and
13 Dr. Burdge. Tr. 47, 50. Considering the ALJ has been instructed to reweigh both
14 Dr. Dougherty's and Dr. Burdge's opinions, he is further instructed to reweigh the
15 opinion of Dr. McDevitt on remand. Considering Dr. McDevitt opined that
16 Plaintiff met listings 12.03 and 12.04, the ALJ is further instructed to readdress
17 step three on remand and address Dr. McDevitt's testimony in his step three
18 evaluation. The ALJ is to have a psychological expert available at a new hearing
19 to testify regarding step three. He will develop the testimony so as to not be left
20 confused by the expert's testimony.

21 **B. Credibility**

22 Plaintiff contests the ALJ's determination that Plaintiff and her mother were
23 less than fully credible. ECF No. 14 at 22-24.

24 It is generally the province of the ALJ to make credibility determinations,
25 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
26 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
27 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
28 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d

1 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. “General findings are
 2 insufficient: rather the ALJ must identify what testimony is not credible and what
 3 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834. An ALJ
 4 must give “germane” reasons to discount evidence from a lay witness. *Dodrill v.*
 5 *Shalala*, 12 F.3d 915, 119 (9th Cir. 1993).

6 Considering the evaluation of a claimant’s statements regarding limitations
 7 relies in part on the assessment of the medical evidence, *See* 20 C.F.R. §
 8 404.1529(c); S.S.R. 16-3p, the ALJ is further instructed to make a new assessment
 9 as to whether Plaintiff’s subjective symptom statements are consistent with the
 10 record as a whole in accord with S.S.R. 16-3p. Additionally, the ALJ is instructed
 11 to make a new determination in weighing the statements of Plaintiff’s mother.

12 REMEDY

13 The decision whether to remand for further proceedings or reverse and
 14 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
 15 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
 16 where “no useful purpose would be served by further administrative proceedings,
 17 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
 18 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
 19 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
 20 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
 21 (noting that a district court may abuse its discretion not to remand for benefits
 22 when all of these conditions are met). This policy is based on the “need to
 23 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
 24 outstanding issues that must be resolved before a determination can be made, and it
 25 is not clear from the record that the ALJ would be required to find a claimant
 26 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
 27 *Benecke v. Barnhart*, 379 F.3d 587, 595-596 (9th Cir. 2004); *Harman v. Apfel*, 211
 28 F.3d 1172, 1179-1180 (9th Cir. 2000).

1 Because of the evidence of substance abuse problems in the record, there is
2 not sufficient evidence that the ALJ would be required to find Plaintiff disabled if
3 all the evidence were properly evaluated. Therefore, the case is remanded for the
4 ALJ to readdress the medical source opinions in the record at step three and in the
5 residual functional capacity determination, including the opinion of Dr. McDevitt.
6 Additionally, the ALJ is instructed to supplement the record with any outstanding
7 evidence and make a new assessment as to whether Plaintiff's subjective symptom
8 statements are consistent with the record as a whole. The ALJ will call a
9 psychological expert to testify at the hearing. Should a mental disorder listing be
10 identified as relevant, the ALJ is to take testimony specifically addressing the B
11 criteria, including restrictions of activities of daily living, difficulties maintaining
12 social functioning, difficulties in maintaining concentration, persistence, or pace,
13 and episodes of decompensation. The ALJ will also take testimony from the
14 expert regarding a narrative residual functional capacity for Plaintiff. Due to
15 Plaintiff's history of substance use, if the record supports a diagnosis of a
16 substance abuse disorder and Plaintiff were found disabled at steps three or five,
17 the ALJ would be required to consider the materiality of Plaintiff's substance use
18 and complete the five step evaluation process again excluding any limitations
19 caused by substance use. *See* S.S.R. 13-2p.

20 CONCLUSION

21 Accordingly, **IT IS ORDERED:**

- 22 1. Defendant's Motion for Summary Judgment, **ECF No. 26**, is
23 **DENIED**.
- 24 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
25 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
26 additional proceedings consistent with this Order.
- 27 3. Application for attorney fees may be filed by separate motion.

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1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
3 and the file shall be **CLOSED**.

4 DATED August 23, 2016.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE